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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

M.M., Plaintiff and Respondent, v. M.S., et al., Defendants and Appellants.	F077572 (Super. Ct. No. BCV-17-102668) **OPINION**

APPEAL from an order of the Superior Court of Kern County. Thomas S. Clark, Judge.

Alexander & Associates, William L. Alexander and Alisyn J. Palla, for Defendant and Appellant.

Braun Gosling and Douglas A. Gosling for Plaintiff and Respondent.

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Respondent plaintiff, M.M., is a resident of County[1] and is employed by a firm that provides consulting services to clients related to, among other things, governmental relations, including political campaigns and interest-group representation. The firm's

[1] To protect confidentiality, we do not specify the California county.

clients include government officials who decide regulations in County and City.[2] M.M., as part of his employment, has provided consulting services related to regulations in County.

Defendants are A. and appellant M.S.; A. is not a party to this appeal. A. obtained a document containing M.M.'s medical information and sent M.M. an email about it with a partially redacted copy of the document attached. M.M.'s name and his medical information was not redacted from the document. M.S., who was reportedly blind carbon copied on A.'s email, sent an email of his own to 61 people, including law enforcement officials and media outlets, with the redacted document containing M.M.'s medical information attached.

M.M. sued A. and M.S. for, inter alia, invasion of privacy, claiming the defendants' sending of emails with the document attached illicitly disclosed his private medical information. The defendants responded by each making a motion under a California statute designed to hasten resolution of certain disputes commonly characterized as strategic lawsuits against public participation (SLAPP)—lawsuits meant to chill the valid exercise of the public's rights to free speech and petition for redress of grievances. (Code of Civ. Proc., § 425.16, subd. (b)(1);[3] see also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Known as the anti-SLAPP statute, this law permits a defendant facing such a lawsuit to dispose of it through a special motion to strike one or more causes of action. Here, A. and M.S. both sought to have the entire complaint stricken, but the trial court denied both of their motions. M.S. appealed from the court's order denying his motion.

As M.S. is the sole appellant, the question before us is whether the causes of action asserted in M.M.'s complaint as against M.S. arise—as required to advance an

[2] We do not specify the city, which is located in County.

[3] Undesignated statutory references are to the Code of Civil Procedure.

anti-SLAPP motion—from M.S.'s acts in furtherance of his right of free speech in connection with a public issue. We conclude they do not. The relevant provisions of the anti-SLAPP statute procedurally protect statements made "in connection with an issue under consideration or review" by a legislative body (§ 425.16, subd. (e)(2)), or "any other conduct in furtherance of" the constitutional rights of petition or free speech "in connection with a public issue or an issue of public interest" (§ 425.16, subd. (e)(4)).

We find the statements M.S. made in his emails, which included the redacted copy of the document containing M.M.'s medical information, were not within the scope of either subdivisions (e)(2) or (e)(4) of section 425.16. We therefore affirm the trial court's denial of M.S.'s special motion to strike.[4]

FACTUAL BACKGROUND

1. M.M.'s complaint

M.M. sued A. and M.S. for invasion of privacy, extortion, negligence, unfair business practices in violation of Business and Professions Code section 17200, et seq., and violation of the Comprehensive Computer Data Access and Fraud Act (Pen. Code, § 502). The complaint seeks damages and injunctive relief.

M.M. alleges he is currently employed "at a corporation that provides consulting services to clients related to media, consumer, industry, and governmental relations including political campaigns and interest-group representation and caucus operations." His "employment has put him in contact with clients who work in the private and public sectors including government officials." Some of his recent work has involved providing

[4] The trial court sealed all documents filed in this case and closed all hearings. In accordance with the California Rules of Court, the sealed documents and transcripts of the closed hearings were filed under seal in this court. (See Cal. Rules of Court, rule 8.46(b).) Additionally, while we are aware of Code of Civil Procedure section 422.30 and 422.40 and Rules of Court, rule 2.111(4), given the unusual circumstances of this case and in conformance with orders of this court and the trial court, we have used a protective nondisclosure caption. (Cal. Rules of Court, rule 2.118(c).)

consulting services related to the regulation of a particular form of medical treatment (the "treatment").

Various current and past clients of M.M.'s consulting firm are legislators who seek to enact legislation limiting the availability of the treatment. M.M. believes A. may be financially interested in businesses that promote the availability of the treatment. As such, M.M. is aware that various past and present clients of his employer may enact legislation that would negatively impact A.'s business ventures. Additionally, M.M. contends A. is aware M.M.'s employment "put [M.M.] in contact with clients who serve as public officials who may be involved in" making decisions for City and County regarding the regulation of the treatment.

One day in October,[5] A. sent M.M. an email with a redacted copy of a document written by M.M.'s physician. In the document, M.M.'s physician recommended that M.M. implement the treatment. M.M.'s name and the fact his physician had recommended the treatment were apparent, but M.M.'s address, driver's license number, physician's name, and other items were redacted. A.'s email explained how A. came to possess the document, and stated A. had contemplated faxing the document to persons in County. A. offered in the email to give the document back to M.M., provided M.M. met with him in person to get it.

The next day, M.S. forwarded the email that A. sent to M.M. to 61 recipients. In M.S.'s forwarding email, M.S. stated M.M.s' full name, where he is employed, and where his employer's office is. Among the 61 recipients were the mayor of City, members of local law enforcement, multiple media outlets, and clients of M.M.'s employer. Also attached to M.S.'s forwarding email was a copy of the redacted document. Later that same day, M.S. forwarded A.'s email to two other persons, one of

[5] To protect confidentiality, we do not specify the date or year.

whom was included in the list of recipients to his first email. Once again, the redacted copy of the document was attached.

M.M. contends M.S. "has a history of making negative statements via innuendo about [M.M.]," and that A. and M.S. "have personal motives against [M.M.'s] employer and the clients of [M.M.'s] employer and desire to silence [M.M.] …."

2. M.S.'s special motion to strike

After M.M. obtained a temporary restraining order and then a preliminary injunction enjoining M.S. from publishing or disclosing M.M.'s private protected health or medical information, M.S. filed a special motion to strike the entirety of M.M.'s complaint pursuant to section 425.16, subdivision (a). M.S. contended the emails he sent were a constitutionally protected exercise of his right of petition and free speech.[6] Specifically, he contended his emails were statements "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," within the ambit of section 425.16, subdivision (e)(2). While he admitted the emails were not made before a legislative body that was considering issues regarding the regulation of the treatment, he argued his emails were sent to persons "who would be considering or otherwise influencing how those matters would ultimately be considered by City and/or County officials." M.S. also added that M.M., by the allegations in the complaint, admitted his client roster includes legislators who vote against expanding the availability of the treatment in the community.

Additionally, M.S. contended his emails were statements within the purview of section 425.16, subdivision (e)(4), which protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech

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[6] In his moving papers, M.S. only referred to a single email. However, the record contains two separate emails. Thus, our discussion here references two emails, not just one.

in connection with a public issue or an issue of public interest." On this ground, M.S. argued that not only was regulation of the treatment an issue of public interest, but that M.M.'s hypocrisy was likewise an issue of public interest. According to M.S., M.M. was a hypocrite because he was—at least at one point—a person who had implemented the treatment and is now a person who has "actively and publicly opposed" the availability of the treatment in City and County. In other words, M.S. argued that M.M.'s status as a "public voice" against the treatment made the fact that his physician had recommended the treatment "one of significant public interest" to persons who are against making the treatment available, as well as to other persons.

M.S. submitted a declaration in support of his motion and also requested the court take judicial notice of the following documents in its file: M.M.'s complaint, M.M.'s declaration filed in support of his ex parte application for a temporary restraining order, the declaration of R.F. filed in support of A.'s opposition to M.M.'s ex parte application for a temporary restraining order, M.M.'s declaration filed in support of his reply to A.'s opposition to M.M.'s request for a preliminary injunction, and A.'s declaration filed in support of A.'s special motion to strike. The court granted judicial notice of both the documents and their contents.

M.S., in his declaration, stated that M.M. has maintained a "persistent [and] public[]" campaign within City and County against the treatment. M.S. also stated he is aware of M.M.'s participation in local political organizations and that M.M. is a voting delegate to a California political party. M.S. also declared he was blind carbon copied on the email A. sent to M.M.[7]

[7] However, in the second email he sent to two recipients, he stated he obtained A.'s email to M.M. by "hacking [A.'s] computer."

M.M. opposed the motion, M.S. filed a reply, and the trial court heard oral argument. The trial court subsequently entered an order denying both M.S. and A.'s motions. Specifically, the court ruled that "governmental authorities may have been considering issues relating to *regulation* of [the treatment], but the governmental authorities were not considering whether or not [M.M. was currently implementing or had previously implemented the treatment] or any related issue. [M.M.'s] presumably lawful activities in his personal life have no bearing on issues of regulation. [¶] Plaintiff's private health information is not a public issue." The court further ruled M.M. was not a public figure, but instead merely an employee of a firm that sometimes engages in the business of lobbying on behalf of its clients. The court likened M.M.'s duties as a lobbyist to those of an attorney advocating on behalf of his or her clients, and found that advocating on behalf of clients does not per se make one a public figure.

Additionally, the trial court found that M.M.'s purported status as a hypocrite does not rise to the level of a public issue. The court explained: "Everyone possesses some degree of hypocrisy. In a sense, based in part on First Amendment rights, people have a right to be hypocrites. There would be no need to recognize privacy rights in our society if being or acting hypocritically always constituted a waiver of such rights." Finally, the court ruled that, in light of its findings that the causes of action in M.M.'s complaint do not arise from M.S.'s rights of petition and free speech, it need not proceed to address whether M.M. could show a probability of success on the merits.

DISCUSSION

Section 425.16, subdivision (b)(1), states, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff

will prevail on the claim." Section 425.16 is to be "construed broadly." (§ 425.16, subd. (a).)

Considering a section 425.16 motion is a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

" 'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, … [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' " (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326.)

A defendant satisfies the first step of the two-prong analysis "by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16' [citation], and that the plaintiff's claims in fact *arise* from that conduct [citation]. The four categories in subdivision (e) describe conduct 'in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' (§ 425.16, subd. (e).)" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620 *(Rand Resources*).) M.S. here contends M.M.'s claims arise from two of those categories: communications "made in connection with an issue under consideration or

review by a legislative body" (§ 425.16, subd. (e)(2)) and "conduct in furtherance of the exercise of … free speech in connection with a public issue or an issue of public interest" (§ 425.16, subd. (e)(4)).

"According to subdivision (e)(2) of section 425.16, 'any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law' is an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' By requiring the communication to be in connection 'with *an issue* under consideration or review' [citation], the terms of subdivision (e)(2) make clear that 'it is insufficient to assert that the acts alleged were "in connection with" an official proceeding.' [Citation.] Instead, '[t]here must be a connection with an issue under review in that proceeding.' " (*Rand Recourses, supra,* 6 Cal.5th at p. 620.)

Alternatively, under section 425.16, subdivision (e)(4), M.M.'s causes of action must arise from M.S.'s conduct "in connection with a public issue or an issue of public interest." Our Supreme Court in *Rand Resources, supra,* 6 Cal.5th 610 set forth a general definition of "public interest" by identifying three qualifying categories of statements. "The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.' " (*Id.* at p. 621.)

The statements underlying M.M.'s claims as against M.S. are the two emails M.S. sent in October. Having pinpointed these underlying statements, the question is whether these statements were made "in furtherance of" M.S.'s rights of petition or free speech "in connection with a public issue," as defined by either subdivision (e)(2) or (e)(4). (§ 425.16, subd. (e).) We hold M.S.'s statements do not fall within the ambit of either subdivision.

1. Subdivision (e)(2)

None of the moving papers mention any specific treatment-related issues under consideration by any specific governing body when M.S. sent his two emails in October. However, the email sent by A. to M.M. refers to a vote to be taken the next day, though it does not specify what type of vote and who is taking it. We are comfortable assuming from M.M.'s complaint and M.S.'s moving papers the regulation of the treatment was an issue of public interest in City and County at the time M.S. sent his two emails.

However, while local governing bodies in County may have been considering issues related to the regulation of the treatment, there is no evidence before us indicating M.M.'s implementation of the treatment was being considered or reviewed by any local board. M.S.'s rationale for treating M.M.'s status as "connected" with the regulatory issues being considered by governing bodies is much too attenuated. Specifically, he contends that City and County officials "needed to know" about M.M.'s physician's recommendation that M.M. implement the treatment before they "legislated or casted … vote[s]" on issues involving the treatment. We fail to see how a consulting firm employee's receiving a treatment recommendation from his doctor would be at all germane, let alone considered necessary information, to a governing body that was considering regulatory issues relating to the treatment. Even if it were shown—which it was not—that some of M.M.'s former clients were decision-makers on local governing bodies that were actively considering issues relating to the treatment, we fail to see how the discovery of M.M.'s possession of a treatment recommendation from his physician would have any effect on their decision-making.

2. Subdivision (e)(4)

As to subdivision (e)(4), we begin again with the assumption that regulation of the treatment was—and still is—a matter of public interest for localities in this state. But M.S. contends M.M.'s identity as a person who implements the treatment is also in and of itself a matter of public interest in County. However, none of the three qualifying

categories of statements set forth in *Rand Resources* demonstrate that M.M.'s identity as a person implementing a treatment recommendation was an issue of public interest. We analyze each of the three categories in turn.

First, none of the evidence filed in support of M.S.'s moving papers showed M.M. was "a person … in the public eye." (*Rand Resources, supra,* 6 Cal.5th at p. 621.) M.S. contended in his memorandum of points and authorities that M.M. has been "dubbed a 'high profile […] foe' " of the treatment who "has actively and publicly opposed" the availability of the treatment within City and County." He further contends M.M. is a "prominent voice against [the treatment]." While M.S. stated in his declaration M.M. maintains "a persistent, public[]" campaign against the treatment within City and County, none of the other documents filed in support of M.S.'s motion evidence that M.M. has been "dubbed 'a high profile […] foe.' " Additionally, the moving papers do not explain if M.M. is well-known to the public at large, or whether he is just known among those who have a particular interest in the political issues surrounding the treatment.

Additionally, there is no evidence showing M.M.'s campaigning and advocacy against the treatment was outside the scope of his employment. In other words, the evidence shows M.M.'s campaigning against the treatment was solely within the scope of his employment. To this point, A. stated in the declaration he filed in support of his own special motion to strike—which M.S. included in his moving papers—"that [M.M.] and/or the company he works for, in connection with the politicians and advocacy groups which employ them and which they have assisted to obtain office, … advocate against the [treatment being legally available]." This demonstrates that M.M.'s advocacy and campaigning concerning the regulation of the treatment was within the scope of his employment.

Additionally, M.S. argues M.M. is a public figure because he has applied for appointment on public committees, has served on the board of directors of a local political organization, and serves as a voting delegate to a California political party.

However, M.S. provides no evidence demonstrating that M.M.'s service and activities in these political committees and organizations put M.M. in the public eye. M.S.'s attempt to liken M.M. to the plaintiff in *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027 is unavailing. In that case, the defendant employee was terminated from his employment and subsequently spoke to a magazine about his work experience. (*Id.* at p. 1032.) The employer sued the employee and other defendants for, inter alia, defamation. (*Id.* at p. 1033.) In affirming the trial court's granting of plaintiff's anti-SLAPP motion, the Court of Appeal found plaintiff's statements to the magazine concerned an issue of public interest because the employer, Nygard, was a prominent Finnish businessman and celebrity in whose activities the magazine's readers had an interest. (*Id.* at p. 1042.) M.M.'s status in the community is in stark contrast to Nygard's. There is no evidence suggesting M.M. is a celebrity, a businessman, or a politician in whom the public had a pre-existing interest. In fact, the evidence is to the contrary.

In sum, there is no evidence suggesting that M.M., an employee of a firm providing consulting services to local politicians on the regulation of the treatment, has become a person in the public eye here by doing his job. Even if there were such evidence, M.S. has provided no authority to support the proposition that a public figure can have his or her personal health information disclosed to the public for the sake of exposing hypocrisy.

We now consider the second category from *Rand Resources*—whether M.S.'s emails relate to "conduct that could directly affect a large number of people beyond the direct participants." (*Rand Resources, supra,* 6 Cal.5th at p. 621.) The "conduct" we examine here is M.M.'s alleged hypocrisy, and we find that M.M.'s hypocrisy would not affect a large number of people beyond M.M. and M.S. While M.M.'s hypocritical implementation of the treatment may be of particular interest to M.M.'s employer, clients, and people especially involved in the local debate on the issue because of those

persons' relationship with M.M., we do not see how any large number of people would be affected by this hypocrisy in any meaningful way. We find it entirely unlikely that people—politicians or ordinary citizens—on either side of a debate regarding the treatment would have their views altered upon learning an employee of a consulting firm turned out to be implementing the treatment despite providing consulting services to people who sought to vote against the treatment being available. Discovering M.M.'s implementation of the treatment would not, based on the evidence before us, add anything meaningful to the public discourse. There have been no allegations M.M. has engaged in corruption or other impropriety that would be of interest to the public.

Finally, we consider the third category of statements from *Rand Resources, supra,* 6 Cal.5th 610—whether M.S.'s emails involved "a topic of widespread, public interest." (*Id.* at p. 621.) As shown in *Rand Resources,* it would seem this factor applies only when there already is widespread, public interest in a topic. Here, M.M.'s receiving a treatment recommendation from his physician was not a topic of widespread, public interest at the time M.S. sent his emails, and thus it would appear the emails do not fit this category. Notwithstanding, and borrowing from our discussion regarding the first and second categories, we find that M.M.'s implementation of the treatment is not a matter of widespread, public interest. M.S. has not shown how a consulting firm employee's receiving a treatment recommendation from his or her physician would be of widespread interest to the public.

It does not matter whether M.M. advocated or campaigned publicly against the availability of the treatment because the evidence demonstrates M.M. was acting within the scope of his employment. When citizens are considering their stances and developing opinions on a political issue, they are interested in the merits of the various sides of the issue; they analyze and weigh the positives and negatives of both sides. As to regulation of the treatment, the public would be concerned about the efficacy and safety of the treatment, the availability and viability of other treatment options, and so forth; a

lobbyist's implementation of the treatment would not impact his or her opinions on regulatory issues concerning the treatment. A person's hypocrisy may make that person appear unprincipled, but it does not disprove the truth or validity of his or her position on an underlying matter.

Because M.S. has not carried his burden of showing M.M.'s causes of action arise from M.S.'s rights of petition or free speech, we need not proceed to the second-prong of the analysis to determine whether M.M. can show a probability of success on the merits.

DISPOSITION

The trial court's order is affirmed. Respondent is awarded his costs on appeal.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P.J.

SMITH, J.